

JUDGMENT

These two appeals are filed challenging the judgment and award dated 28.02.2011 passed by the Commissioner for Workmen's Compensation, Haveri, (for short 'the Commissioner) in W.C.A.Nos.25/2010 and 26/2010 questioning the maintainability, liability and quantum.

2. The factual matrix of the case of the claimants before the Commissioner is that deceased Shamiulla, on 26.05.2009 when the husband of the Tahaseentaj (claimant/respondent No.1) was travelling in a lorry bearing registration No.KA-05/B-7009 as a second driver along with his son Irfan and the said vehicle was driven by his another son Majju @ Majjumeerpasha and the said vehicle met with an accident as a result of which Shamiulla and Irfan both sustained grievous injuries and succumbed to the injuries on the spot. Hence, wife of Shamiulla, son and daughter of Shamiulla filed two claim petitions before the Commissioner seeking for compensation for the death of Shamiulla and Irfan.

3. In support of their claim, the wife of Shamiulla got examined herself as PW-1 and also got marked documents Ex.P.1 to Ex.P.12. On the other hand, the Administrative Officer of Insurance Company is examined as RW-1 and got marked documents Ex.R.1 and Ex.R.2 and the owner of the vehicle was placed exparte. The Commissioner considering both oral and documentary evidence allowed the claim petitions awarding compensation of Rs.3,26,140/- in WCA No.25/2010 and Rs.3,99,945/- in WCA No.26/2010 with interest at the rate of 12% p.a. after 30 days of the accident. Being aggrieved by the said judgment and award, the Insurance Company has filed the present appeals.

4. In M.F.A.No.23205/2011 which is in respect of death of Shamiulla, the Insurance Company has vehemently contended that the Commissioner has blindly held that Shamiulla was the second driver in the vehicle when the claimants had failed to produce any documents to show the relationship of employer and employee

between the deceased and respondent No.4 and also failed to produce the driving licence of the deceased which itself goes to show that the deceased was travelling as a passenger in the vehicle at the time of the accident. It is also contended that the driving licence produced by the claimants was not valid as on the date of the accident. Hence, the Commissioner would have held that as per the conditions of the policy issued, the appellant is not liable to pay the compensation. In the appeal memorandum, substantial questions of law are raised contending that the Commissioner was not justified in holding that the policy issued by the Insurance Company covered the second driver. In the absence of any premium, question of fastening the liability on the Insurance Company does not arise. It is also contended that the Commissioner was not justified in awarding interest at the rate of 12% p.a. and that no material is produced to show that there exists relationship of employer and employee between the deceased and the owner of the vehicle.

5. In M.F.A.No.23206/2011 in respect of the death of Irfan, the Insurance Company has urged similar grounds as urged in M.F.A.No.23205/2011. Apart from that contended that only on the version of claimant No.1, held that deceased was working as a cleaner in the lorry as on the date of the accident though no document was produced to show that he was working as a cleaner and the driver of the lorry is not examined in the case to prove the case of the claimants. Hence, it clearly shows that the deceased was travelling as a passenger in the lorry with his father. It is also contended that the Commissioner was not justified in awarding compensation in respect of a minor boy aged 15 years working as a cleaner.

6. Learned counsel for the appellant/Insurance Company reiterating the grounds urged in both the appeals, relied upon a judgment of the Hon'ble Apex Court in Civil Appeal No.5/2013 disposed of on 03.01.2013 wherein the Apex Court ordered to pay and recover the amount from the owner following the principles laid in

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The learned counsel would vehemently contend that first of all the minor cannot be made to work as a cleaner and hence, the Commissioner has lost sight of the said fact and has awarded compensation. The Commissioner also committed error in fastening the liability on the Insurance Company which it was not proved that the deceased Shamiulla was working as a driver and there exist relationship of employer and employee in respect of both the claim petitions. Learned counsel would also submit that the order to pay and recover is under Article 142 of the Constitution of India and the exclusive powers are vested only with the Hon'ble Apex Court and not by any other Court.

7. Learned counsel would also submit that the additional premium is not paid in respect of the second driver but an amount of Rs.50/- is paid only in respect of

one driver and not in respect of additional driver as contended by learned counsel for the claimants'.

8. Per contra, learned counsel appearing for the respondents/claimants would vehemently contend that additional premium of Rs.50/- is paid in terms of the policy and that All India Permit was given to the said vehicle and when All India Permit is given, second driver is also covered under the policy. The learned counsel would also submit that the claim is made only in respect of one driver and other driver has not made any claim. Learned counsel would also submit that the owner of the vehicle made his statement in terms of Ex.P.12 stating that the deceased was a second driver and other victim was working as a coolie. No material is placed by the Insurance Company to show that the cleaner was a minor. Except relying upon the post mortem which is not an authenticated document, no other document is produced to prove the age of the deceased. Learned counsel would submit that in the claim petition it is mentioned that Irfan was working as a cleaner

and aged about 18 years and the Commissioner considering the material on record answered points for consideration independently by giving the reasons which do not call for any interference.

9. The learned counsel relying upon the judgment of this Court in **UNITED INDIA INSURANCE COMPANY VS. SMT.SHANTHAVVA AND OTHERS (2006 ACJ 1212)** would submit that in similar circumstances the Court held that if there are two separate claims in respect of driver and spare driver unless additional premium is paid, the insurer may not liable to pay for both the drivers and if the claim is in respect of only one driver even if he is not actually driving at the time of the accident still the insurer becomes liable to pay under Section 147 of the Motor Vehicles Act as a statutory liability. This Court referred to the judgment in **ORIENTAL INSURANCE COMPANY LTD., VS. KHASIM** wherein it has been laid down that the insurer is liable to pay compensation for the spare driver by virtue of provisions of Rule 100 of the

Karnataka Motor Vehicles Rules and Section 147 of the Motor Vehicles Act which insists statutory cover for employees employed in connection with the motor vehicle. Therefore, the insurer in any circumstance cannot avoid payment of compensation to a spare driver. The learned counsel referring to this judgment would vehemently contend that the judgment of this Court is aptly applicable to the facts of the case on hand. Learned counsel for the claimants also relied upon the judgment of this Court in M.F.A.No.22969/2012 dated 25.08.2020 and would vehemently contend that under Order XLI Rule 33 of the CPC in the absence of any appeal by the claimants, the Court can enhance the compensation. Hence, he submits that the Commissioner has committed an error in taking the income as Rs.3,500/- p.m. in respect of Irfan and this Court has to enhance the compensation.

10. Having heard the learned counsel appearing for the parties and also on perusal of the material available on record and keeping in mind the grounds urged in the

appeal memo as well as the oral submissions of respective counsels, the points that arise for consideration of this Court are:

- i) Whether the Commissioner has committed an error in fastening the liability on the Insurance Company as contended by the Insurance Company in both the appeals?
- ii) Whether the Commissioner has committed an error in holding that there exists relationship of employer and employee between the respective deceased and the owner of the vehicle?
- iii) Whether the Commissioner has committed an error in granting compensation in respect of the claim for the death of Irfan?
- iv) Whether the claimants/respondents have made out a ground to invoke Order XLI Rule 33 of

the CPC to enhance the compensation in the appeals filed by the Insurance Company?

v) What order?

Reg:Point Nos.1 to 3

11. In the claim petitions filed before the Commissioner the claimants claim that they are the legal representatives of deceased Shamiulla and the deceased Irfan is the son of Smt. Tahaseentaj and brother of claimants Nos.2 and 3 wherein they have claimed the compensation contending that respondent No.2 is the insurer and respondent No.1 is the employer of the deceased. The Insurance Company filed the written statement disputing the same. The claimants in both the cases have examined PW-1 who is the wife of Shamiulla and mother of the deceased Irfan and got marked documents Ex.P.1 to Ex.P.12.

12. PW-1 was subjected to the cross-examination. No doubt in the cross-examination, answer is elicited from the mouth of PW-1 that the deceased Shamiulla was not

driving the vehicle at the time of the accident and also admits that no documents are produced to show that Shamiulla was working as a driver and her son Irfan was working as a cleaner. Since no such documents are obtained from the owner of the vehicle, it is also elicited that with regard to the salary, no documents are produced. It is suggested that Irfan was not aged 18 years and the same was denied and with regard to the age of her husband she claims that date of birth is mentioned in the driving licence but she categorically admits that Irfan had not studied. PW-1 admits that her son was driving the vehicle at the time of the accident and the vehicle was travelling from Bengaluru to Suratkal. But, it is the claim of the Insurance Company that both of them were proceeding as unauthorized passengers and the said suggestion was categorically denied by PW-1 and elicited that the other son Majju @ Majjumeerpasha who was driving the vehicle has still continued the job as a driver. Thus, it is suggested that only in order to get the compensation, claim petitions are filed claiming that the

deceased were working as driver and a cleaner and the said suggestion is also denied.

13. The Insurance Company examined its Administrative Officer as RW-1 and in his evidence, he states that on the date of the accident both the deceased persons were proceeding as unauthorized passengers and as no premium is paid for two drivers, the Insurance Company is not liable to pay the compensation. In the cross-examination, it is elicited that the owner of the vehicle has made a statement before the police that Shamiulla and deceased Irfan were working in the lorry but he volunteers that he has made a false statement. It is suggested that driver was having a valid driving licence and the same is denied. He admits that he did not examine the RTO to show that the driver was not having valid driving license but he admits that in respect of one driver policy is covered. But he volunteers that the deceased Shamiulla was not working as a driver.

14. On perusal of the material on record, it is seen that a case has been registered against the driver of the offending vehicle and also the fact that he was the son of Shamiulla is also not in dispute. To prove the relationship, the claimants have relied upon the document Ex.P.11. The said statement was recorded by the police on 27.05.2009 i.e., on the very next date of the accident and the owner in his statement has stated that Shamiulla was working as first driver and Majju @ Majjurneerpasha was working as a second driver and Irfan was working as a cleaner. Apart from that, the document Ex.P.12 is also produced before the Commissioner to show that Shamiulla was having a valid driving licence. But in the appeal memo, it is contended that no document of driving licence of the deceased was produced and the said contention cannot be accepted. The driving licence which is produced before the Court also shows the date of birth of Shamiulla as 15.04.1962. The accident has taken place in the year 2009 and hence, it is clear that Shamiulla was aged about 47 years as on the date of the accident. But, the

Insurance Company mainly relies upon the Post Mortem report of both the deceased.

15. The Post Mortem report of the deceased Shamiulla discloses his age as 50 years and it is only an approximate age mentioned by the doctor while conducting post mortem and the same is not authenticated document and authenticated document is Ex.P.12, the driving licence which shows that he was born in the year 1962. In the case of deceased Irfan, the doctor has mentioned the age as 15. The learned counsel for the Insurance Company based on the post mortem report contends that he was a minor and in order to prove the said fact, no other documents are placed. Having considered the age mentioned in the post mortem report in respect of deceased Shamiulla wherein this Court found 3 years difference, the very contention of the Insurance Company that Irfan was a minor at the time of the accident cannot be accepted. But PW-1 categorically denied the suggestion in the cross-examination that Irfan was a minor but she

claims that he was aged about 18 years. It is also elicited from the mouth of PW-1 that Irfan had not studied. It is also made to know that Ex.P.11 discloses that the owner had made the statement on the very next day of the accident that there were two drivers in the vehicle along with a cleaner. The fact that no other cleaner was there in the lorry is emerged during the course of evidence and no suggestion was made that other cleaner was there in the lorry. Hence, it is clear that in view of the statement made by the owner on the very next date of the accident that two drivers were there in the vehicle and though it is disputed by the Insurance Company that the deceased was not a driver and not produced the driving license and when such being the case, the very contention of the Insurance Company that no document is produced, cannot be accepted in view of Ex.P.12.

16. The very contention of the Insurance Company that he Irfan was a minor and he was not working as a cleaner and the owner also was placed exparte and in

order to substantiate the said contention of the Insurance Company, it ought to have summoned the owner to deny the relationship between the deceased persons and also the owner and the same has not been done except taking the defence.

17. With regard to the other defence that Insurance Company is not liable to pay compensation in respect of the second driver and the owner being made the statement before the police that Shamiulla was the first driver and his son is the second driver and on perusal of Ex.R.2 no separate premium is paid in respect of the second driver and in view of the judgment of this Court relied upon by the learned counsel for the claimants in **UNITED INDIA INSURANCE COMPANY VS. SMT.SHANTHAVVA AND OTHERS** supra wherein in similar circumstances this Court held that the spare driver is also very much a person engaged in driving the vehicle, may be on shift basis and that the word 'engaged in driving the vehicle' should not be interpreted to mean only

the driver on the steering excluding a spare driver, the insurer is very much liable to pay compensation in respect of a spare driver under Section 147 of Motor Vehicles Act if there is only one claim under the policy. However, if there are two separate claims in respect of driver and spare driver unless additional premium is paid the insurer may not be liable to pay for both the drivers. If the claim is in respect of only one driver even if he is not actually driving at the time of the accident still the insurer is liable to pay under Section 147 of MV Act as a statutory liability.

18. In the case on hand also admittedly the deceased Shamiulla was not driving the vehicle at the time of the accident and also only one claim was made before the Commissioner and witness examined on behalf of the Insurance Company i.e., RW-1 has also categorically admitted in the cross-examination that premium is paid in respect of one driver. This Court also in ***ORIENTAL INSURANCE COMPANY LTD., VS. KHASIM*** wherein it has been laid down that the insurer is liable to pay

compensation for the spare driver by virtue of provisions of Rule 100 of the Karnataka Motor Vehicles Rules and Section 147 of the Motor Vehicles Act which insists statutory cover for employees employed in connection with the motor vehicle.

19. No doubt, in the cross-examination of PW-1, it is elicited that no document is obtained from the owner to show that both of them were working with him but owner himself made statement before the police on the next day of the accident as per Ex.P.11 that both of them were working with him and in order to rebut the same, Insurance Company has not examined the owner of the vehicle which was involved in the accident and hence the very contention of the Insurance Company that the insurance company is not liable to pay compensation in respect of the spare driver cannot be accepted. The principles laid in **UNITED INDIA INSURANCE COMPANY VS. SMT.SHANTHAVVA AND OTHERS** aptly applied to the case on hand.

20. Having considered both oral and documentary evidence available on record and also the finding of the Commissioner that relationship of employer and employee has been established and that both the deceased were travelling in the vehicle as spare driver and cleaner, I do not find any error in the judgment and award.

21. The main contention of the Insurance Company that both of them were unauthorized passengers, to substantiate the said defence no material is placed before the Court except examining the Administrative Officer RW-1 and hence I do not find any error in the order of the Commissioner for Workmen's Compensation. Hence, I answer points Nos.1 to 3 in the negative.

Reg:Point No.4:

22. The other contention of the learned counsel appearing for the claimants is that the Commissioner has not awarded just and reasonable compensation and

considered only an amount of Rs.4,000/- p.m. as income for the death of Shamiulla and an amount of Rs.3,500/- p.m. for the death of Irfan and this Court can invoke under Order XLI Rule 33 of the CPC to grant adequate compensation. In support of his argument, he relied upon the judgment of this Court in M.F.A.No.22969/2012 dated 25.08.2020 wherein it has been held that in the absence of an appeal by the claimants, the Court can enhance the compensation.

23. Having considered the submissions and material on record, there is no dispute with regard to invoking of Order XLI Rule 33 of the CPC to enhance the compensation even in the absence of an appeal by the claimants. But the same is applicable only if the claim of the claimants is not considered and not awarded just and reasonable compensation and if there is any error on the record, then only the Court can exercise the power under Order XLI Rule 33 of the CPC to meet the ends of justice. In the case of death of Shamiulla, an income of Rs.4,000/-

p.m. has been taken into consideration as he was working as a driver and the same is based on the statutory provisions of the wages fixed. Hence, question of invoking Order XLI Rule 33 of the CPC does not arise.

24. In case of death of Irfan, it is the claim of the claimants that he was working as cleaner and the Court has to take note of the age of the deceased as 18 years. In terms of the PM report, he was aged about 15 years and this Court while considering the same has taken note of the age assessed by the doctor during the course of conducting the post mortem and found the difference as per the records in terms of Ex.P.12 pertaining to Shamiulla there was a difference of 3 years and this Court taking note of the said fact the age of the deceased Irfan would be 18 years. The Insurance Company has not placed any documentary evidence except relying upon the post mortem. Having considered the said age and his avocation as a cleaner, the Commissioner has rightly taken the income of Rs.3,500/- and hence question of invoking Order

XLI Rule 33 of the CPC does not arise, Hence, I do not find any force in the contention of the claimants' counsel and I answer point No.4 as negative. Accordingly, I do not find any merit in the both the appeals.

25. In view of the above discussions, I pass the following:

ORDER

- i) The appeals are dismissed.
- ii) The amount deposited by the Insurance Company is ordered to be transferred to the Tribunal forthwith.
- iii) The registry is directed to send back the TCR forthwith.

**[SD/-]
JUDGE**

Jm/-